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No. 89-480

In the Supreme Court of the United States

OCTOBER TERM, 1989

MARION OVERTON WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when petitioner was charged with obstructing justice by attempting to induce a witness to provide information supporting a fabricated defense in a civil case, the trial court erred in admitting evidence that petitioner had attempted to induce two other individuals to provide similar false information.

2. Whether a juror's misstatement during *voir dire* concerning his educational background required a new trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unpublished, but the decision is noted at 876 F.2d 893 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1989. A petition for rehearing was denied on July 27, 1989 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on September 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was

convicted on one count of obstruction of justice, in violation of 18 U.S.C. 1503. He was fined $1,000. The court of appeals affirmed.

1. The evidence at trial, which is summarized in the court of appeals' opinion and the government's brief in that court, demonstrated that petitioner attempted to induce three acquaintances to provide information supporting a defense that he had fabricated to avoid liability in a civil action. Pet. App. 2a; Gov't C.A. Br. 6-9.

In 1984, a tractor trailer was severely damaged when it hit three cattle on a highway. The ear tag on one of the cattle indicated that it belonged to petitioner. The owner of the truck and other interested parties initiated a civil action against petitioner in federal court, seeking damages totalling approximately $150,000. Gov't C.A. Br. 6-7.

After the accident, petitioner told a representative of his insurance company that he had sold the cattle to Pie Green. To bolster that story, he approached Pie Green and asked Green to claim ownership of the cattle. Pie Green refused to cooperate. Petitioner also urged Elgy Sam to claim to have delivered the cattle to Pie Green. Thereafter, petitioner offered Arthur Ted Green, Pie Green's brother, $1,000 to claim that he was the owner of the cattle. Arthur Ted Green refused. During his deposition in the civil case, petitioner nevertheless denied owning the cattle and testified that he had sold them to "Ted" Green. Gov't C.A. Br. 7-9; Pet. C.A. App. 4.

In a two-count indictment, petitioner was charged with committing perjury at his deposition, in violation of 18 U.S.C. 1621, and obstructing justice by attempting to induce Arthur Ted Green to claim falsely that he was the owner of the cattle, in violation of 18 U.S.C. 1503. The district court dismissed the perjury count before trial because the

individual who had sworn petitioner at his deposition had not been qualified to administer an oath. Pet. App. 2a.

Before opening statements, the government advised the district court of its intention to introduce evidence of petitioner's efforts to induce Pie Green and Elgy Sam to provide false information suggesting that petitioner was not the owner of the cattle. The prosecutor argued that evidence of those efforts was admissible because they were intertwined with petitioner's attempt to influence Arthur Ted Green, and because the evidence also tended to show the motive underlying petitioner's approach to Green. The district court admitted the evidence. See Tr. 71-75, 93-95.

In a post-trial motion, petitioner sought a new trial on the ground that one of the jurors, Robert Ward, had misrepresented his educational background during *voir dire*. Ward had stated that he was a third-year student at Southern University in Baton Rouge, Louisiana (the college petitioner had attended), when in fact he had only recently graduated from high school and had never attended college. In a hearing on the motion, Ward explained that during *voir dire* he had been nervous and embarrassed that he had been late in finishing high school; he also stated that he had been anxious to serve on the jury and thought he stood a better chance of being chosen if he claimed to be a college student. Ward testified that he had been impartial during the trial. The district court denied petitioner's motion for a new trial. Gov't C.A. Br. 4-5, 31-32.

2. The court of appeals affirmed. Pet. App. 1a-7a. It held that the district court had not abused its discretion in admitting testimony by Pie Green and Elgy Sam regarding petitioner's attempts to influence them. The court of appeals joined in the district court's conclusion that those attempts were "part and parcel" of the offense with which petitioner was charged and thus were not evidence of other

crimes that was inadmissible under Fed. R. Evid. 404(b). Pet. App. 5a.

The court of appeals also rejected petitioner's argument that juror Ward's misrepresentation concerning his educational background required a new trial. Applying the standard established by this Court in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), the court of appeals held that there had been no showing that Ward had harbored any actual bias or that his false statement regarding his education had affected the fairness of the trial. Pet. App. 7a.

ARGUMENT

1. Petitioner renews his contention that evidence regarding his attempts to induce Pie Green and Elgy Sam to support his fabricated defense should have been excluded. In petitioner's view, the district court mistakenly failed to apply Fed. R. Evid. 404(b) to that evidence, and his decision to limit his defense to character witnesses foreclosed its admission. Pet. 5-15. The court of appeals correctly rejected those contentions, and they do not warrant further review in this Court.

By its terms, Rule 404(b) applies only to evidence of "other crimes, wrongs, or acts." Accordingly, a number of courts of appeals have held that the Rule does not govern the admissibility of evidence of acts that are closely related to the offense charged. *E.g.*, *United States* v. *Tripp*, 782 F.2d 38, 41 (6th Cir.) (card games within the time frame of a gambling conspiracy alleged in the indictment were not "other acts" for purposes of Rule 404(b)), cert. denied, 475 U.S. 1128 (1986); *United States* v. *Weeks*, 716 F.2d 830, 832 (11th Cir. 1983) (evidence is not considered "extrinsic" if it "arose out of the same transaction or series of transactions as the charged offense"); *United States* v. *Aleman*, 592

F.2d 881, 885 (5th Cir. 1979) (act is not "extrinsic" if the evidence used to prove it and evidence used to prove the offense charged are "inextricably intertwined").[1] Petitioner does not challenge the correctness of this line of authority or suggest that it is the subject of a conflict among the circuits. Rather, the substance of his argument is that the lower courts erred in their determination that the approaches to Elgy Sam and Pie Green were "part and parcel" (Pet. App. 5a) of the offense alleged in the indictment. See Pet. 5-8. The court of appeals properly rejected that factbound contention, and it does not raise any issue calling for this Court's review.

In any event, the evidence clearly satisfied the standards of Rule 404(b). Evidence that petitioner had sought to induce Elgy Sam and Pie Green to support his false claim that he was not the owner of the cattle in question was not admitted for the purpose prohibited by Rule 404(b)–*i.e.*, to show that he had a propensity to commit crimes. Rather, along with evidence that petitioner told his insurance company that he was not the owner of the cattle and testified falsely at his deposition, the evidence concerning Elgy Sam and Pie Green tended to show petitioner's plan to fabricate a defense to avoid liability in the civil

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[1] In our view, the question whether acts not charged in an indictment are "intrinsic" or "extrinsic" to the offense charged is largely a matter of semantics. Under Rule 404(b), the ultimate issue is whether the evidence is offered for some purpose other than to prove the defendant's bad character–*i.e.*, his propensity to commit crimes. As in this case, evidence of other acts that are "part and parcel" of offenses alleged in an indictment will almost invariably be admissible to prove an issue other than the defendant's character. Moreover, whether or not evidence is analyzed under Rule 404(b), it must also pass muster under Fed. R. Evid. 403, which requires the trial court to balance the evidence's probative value against its prejudicial effect. See, *e.g.*, *United States* v. *Tripp*, 782 F.2d at 41.

action. Proof of that overall scheme also tended to establish his intent to impede the administration of justice, see *Pettibone* v. *United States*, 148 U.S. 197, 207 (1893); *United States* v. *Moon*, 718 F.2d 1210, 1236 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984), as well as the motive underlying his approach to Arthur Ted Green.

As the court of appeals concluded (Pet. App. 5a), the admission of evidence regarding petitioner's approaches to Elgy Sam and Pie Green was also not an abuse of the district court's broad discretion under Fed. R. Evid. 403. The evidence was highly probative of the offense alleged in the indictment, and there was little, if any, possibility that the jury would rely on it for an improper purpose. The fact that petitioner's defense consisted solely of character evidence did not require a different conclusion. Petitioner pleaded not guilty to the offense charged, and he did not admit any of the elements of the offense with which he was charged. In particular, he did not concede that he had acted in accordance with a plan to establish a false defense to the civil action or that his intent in approaching Arthur Ted Green was to impede the administration of justice. Because those issues were subject to dispute at trial even though petitioner chose not to offer evidence on them, the district court was not deprived of its customary discretion to conclude that the probative value of the evidence outweighed its prejudicial effect.

As the decisions cited in the petition reflect (see Pet. 10-15), a trial court called upon to determine the admissibility of "other acts" evidence may properly consider whether that evidence is cumulative or whether the issues to which it relates are uncontested. Those matters are relevant to the question whether in a particular trial the evidence has probative value that outweighs any risk that it will be put to an improper purpose. However, no rule of

evidence suggests that the admissibility of otherwise relevant and probative evidence is conditioned on a defendant's introduction of evidence. Any such requirement would be inconsistent with the Court's reasoning in *Huddleston* v. *United States*, 485 U.S. 681 (1988). Under *Huddleston*, evidence of "other acts," like any other evidence, is presumptively admissible when it satisfies the Rules' requirement of relevance.

2. Petitioner also contends that the court of appeals misapplied the standards set forth in *McDonough Power Equipment, Inc.* v. *Greenwood*, *supra*, to juror Ward's misrepresentation regarding his educational background. In *McDonough*, the Court held that to obtain a new trial in this type of situation (464 U.S. at 556)

> a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause.

In this case, there is no dispute that juror Ward failed to answer honestly questions directed to his educational background. However, the district court and the court of appeals correctly determined that this misstatement did not satisfy the second part of the *McDonough* test. If Ward had testified truthfully that he was only a high school graduate and that he had not attended Southern University, there would have been no basis for a challenge for cause.

Contrary to petitioner's suggestion, the fact that Ward's motives for misstating his education included a desire to serve on the jury does not support a different conclusion. In *McDonough*, the Court emphasized that "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." 464 U.S. at 556. Here, Ward's motives–his embarrassment at having finished high school

at the age of 21 and his anxiousness to serve as a juror (Gov't C.A. Br. 32)–did not suggest that he was prone to favoring either party during the trial.[2] Moreover, the post-trial hearing on petitioner's motion disclosed no evidence whatever that Ward was actually biased or that he had failed to discharge his obligations as an impartial juror. There was no showing that Ward's misrepresentation had any effect on the fairness of the trial. Under *McDonough*, petitioner's motion for a new trial was properly denied.

CONCLUSION

The petition for a writ of certiorari should be denied. Respectfully submitted.

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NOVEMBER 1989

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[2] In the cases cited in the petition (Pet. 16-17), by contrast, jurors had concealed information that suggested a bias toward a party in the case. In *United States* v. *Scott*, 854 F.2d 697, 698 (5th Cir. 1988), the juror failed to disclose, in response to a question regarding potential jurors' relationships with law enforcement officers, that his brother was a deputy sheriff; moreover, the trial court found that if that information had been disclosed, the juror would have been excused for cause. Similarly, in *United States* v. *Colombo*, 869 F.2d 149 (2d Cir. 1989), the juror intentionally withheld the information that her brother-in-law was a government lawyer.

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